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SOME FUNDAMENTAL DISTINCTIONS IN LABOR LEGISLATION.

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In the scholarly presidential address, which he delivered a year ago at the first annual meeting of this association, Professor Ely dealt with the relations of labor legislation to economic theory. He showed that most of the early economists were on principle opposed to legislation which seemed to them to be a futile interference with economic laws, but that their successors gradually changed their views, until at the present day there are very few who would condemn labor legislation as such. If, however, we no longer hold that all labor legislation is unscientific and futile, neither do we believe that all that goes under that title is scientific and effective. Still less do we believe that everything that is demanded in the name of labor is going to accomplish what is expected of it, even when we approve of its general aim. And while the doctrine of *laissez faire* no longer ranks as an infallible principle of state-craft, it may still serve the useful purpose of the slave who stood behind the triumphant Roman general to remind him that he was still a man. We, too, need occasionally to be reminded that, though legislation has accomplished much, it has also frequently failed; that it is very apt, even when successful, to produce unexpected results; and that we cannot be too careful to study with all of the statistical and administrative material at our disposal the complex operation of past laws before advocating new ones. We prefer to let evils work their own

cure, if they can, and we must always balance the "ills we have" against those "we know not of." We have thus reached the point at which the emphasis should be laid, not on negation, nor on agitation, but rather on discrimination.

The general term labor legislation embraces at the present day a heterogeneous mass of enactments which impinge upon the individual in very different ways, and which really fall into three quite distinct classes, if we group them with reference to their immediate bearing on economic processes.

In the first class, which is also the oldest, we have what is commonly termed labor protective legislation. Familiar types are laws limiting the age of employment of children, limiting the hours of employment, prohibiting certain kinds of employment to women or children, requiring the use of safety appliances in connection with machinery, limiting migration, etc. They determine the conditions under which labor must be performed, but do not directly affect the terms of exchange. They operate like dykes, which confine a river to a certain bed but do not change the flow or general course of the water.

In the second class we have legislation which aims not so much at excluding certain unfavorable conditions of labor as at the direct bestowal of pecuniary benefits. This legislation may not inappropriately be called distributive or positive legislation. Compulsory insurance laws which require the employer or the state to contribute a part of the funds would come under this head, as well as employers' liability laws, old age pension laws, laws providing for the fixing of wages by wage boards or compulsory arbitration, etc. These laws require certain positive contributions on the part of the public, the employer, or the wage receiver, or of several of them combined. They

directly affect the terms of exchange by supplementing or modifying the wage contract.

In the third class we have legislation which is designed to encourage or promote certain institutions, but which neither contains a prohibition nor an injunction, and may therefore be called permissive. Most of these laws in their application to labor involve the use of certain forms of self help. In this group we should include, therefore, laws permitting and regulating labor organizations, benefit societies, coöperative associations, voluntary arbitration boards, joint boards for collective bargaining, etc.

The attitude of the law-giver towards the citizen in these three classes may be tersely expressed as follows: laws of the first class are mainly prohibitive and say "thou shalt not;" laws of the second class are mainly mandatory and say "thou shalt;" laws of the third class are mainly permissive and say "thou mayest."

It would carry us too far to attempt any statistical study of the way in which the laws of these three classes have operated in practice, but their influence upon economic forces may be explained by an analogy drawn from another and less debatable department of economics. While on many topics economists are still at variance, the experience of the world in dealing with money has been so long, and it has been the subject of such careful study, that, in spite of differences of opinion regarding certain points of monetary policy, there is a pretty general agreement regarding the laws of monetary circulation. One of the most important aims of all monetary legislation is to establish a definite standard of value. For centuries the world's standards were steadily deteriorating. For many years after Sir Thomas Gresham had formulated his famous law, according to which bad money drives out good money, no means had been discovered of coun-

teracting what seemed to be an inevitable law of monetary degeneracy. Just as soon as one metal depreciated in value, just as soon as the government issued coins of light weight, or dishonest people sweated or clipped the coins, the inferior coins tended to remain in circulation, while the better ones were melted down or hoarded. The competition of those who had money to sell,—that is, who wished to buy goods,—took the form of offering the poorest money that the other party to the bargain could be induced to accept. Gresham's law was, however, not an inevitable law of nature. Like all economic laws it expressed a tendency; therefore, it expressed what will happen under conditions favorable to that tendency. It did not say that the tendency could not be neutralized by changing the conditions. And as soon as the government decreed that coins below a certain weight and fineness should not be received as legal tender, and provided for the retirement of light coins, the profit on using cheap money disappeared. The question was no longer, how bad a coin can be palmed off for a certain kind of merchandise, but how much merchandise shall be given for a standard coin.

Now there is a close analogy between the condition of things in the world of money down to the end of the eighteenth century, and in the world of labor during a good part of the nineteenth. In the wholesale and impersonal demand for labor which grew up with the factory system there was a natural tendency to employ those who would work for the longest hours and at the lowest wages. The result of employing this cheap labor was in the end to also make labor less efficient, and therefore worth less to the employer. It was practically impossible for the individual to fight against this tendency. An employer who deliberately paid higher wages in the

expectation of getting more efficient labor was in the position of a person who should endeavor to raise the standard of the coinage by always paying out the best instead of the poorest coins that passed through his hands. He would have his trouble for his pains, and others would reap the benefit of his liberality. When the laws were passed against child labor, limiting the hours of employment, limiting the age of employment, etc., and enforcing them by inspection, a new standard was created. The buying and selling of labor did not cease. The demand and supply acted as before. But the conditions under which they acted were changed. A child of ten years was no longer legal tender in the labor market. A day of thirteen hours was no longer a legal standard of time wages. The government did for labor what it had done for money, by providing that certain kinds of service should be as illegal as certain kinds of money were. The intervention of the state established a standard, changed the conditions of competition, and made it impossible for the employer to employ labor below a certain grade.

Labor laws of the second class, which I have designated as "distributive", also have their analogy in monetary legislation. Just as the monetary standard has sometimes been changed in order to benefit a certain class, especially to bring about a redistribution of wealth between debtor and creditor, so most of these laws endeavor to bring about a redistribution of wealth either between employer and employed, or between present and future income. If the government, for instance, issues paper money which is worth only ninety per cent of its face value, the debtor gains a hundred dollars on every transaction of a thousand dollars. Just so a law providing for compulsory insurance at the expense of the employer vir-

tually says: whenever you owe \$1 in wages you are obliged to pay not merely the \$1 stipulated, but \$1 plus a certain percentage needed to pay for the cost of insurance. Now while changes in the value of money which are brought about by unforeseen variations in the value of the metal may produce beneficial effects, history has taught us the danger of changes which are made deliberately with the intention of helping one class at the expense of another, and the history of labor legislation likewise shows that such a danger is inherent in all legislation of this kind. The danger is not great enough in all cases to condemn it. But there is always a risk of demoralizing the class supposed to be benefited in any law which produces a gratuitous distribution of property, unless carefully guarded against abuse. This danger is seen in the inheritance of millions by an irresponsible heir, in the marrying of millions by a conscienceless fortune hunter, in the subsidizing of industry by a protective tariff, no less than in lavish poor relief and in the transfer of wealth by law to the working middle class. All such laws are exposed to a danger not found in laws of the first class, which involve primarily a restriction rather than a privilege.

Labor laws of the third class also find their analogy in monetary legislation. Laws providing for the chartering of banks are here the counterpart of laws providing for the organization of trade unions, coöperative societies, and voluntary arbitration boards. A national banking law does not necessarily create national banks. National banks exist only if there are enterprising capitalists who desire to organize themselves under the law. For the same reason a law permitting the existence of trade unions does not necessarily lead to their formation. No unions will be formed, unless there are people who can command

the intelligent leadership and interest needed to organize them. The form, too, which they take will depend upon the national character, the economic and social habits, the prejudices, and even theories of those concerned. Hence we see that labor unions have taken one form in England, but quite different forms in Germany, and still different forms in France.

In distinguishing these three types I do not mean to assert that they are always kept perfectly distinct in practice. Labor legislation sometimes progresses in the accomplishment of a certain end from one type to the other. The small success of voluntary schemes for workingmen's insurance led the German government to introduce compulsory insurance, thus passing from laws of the third type to those of the second. As regards savings, this matter is still regulated by laws of the third type in general, but some economists are now advocating compulsory saving as a kind of insurance against unemployment. Likewise the limited success of voluntary arbitration boards has led in Australasia to compulsory arbitration. In still other cases two methods may be combined in a single law. Thus in the Ghent system of insurance against unemployment, there is a coercive or distributive feature in that the town pays out of the proceeds of taxation a certain sum towards the allowance of those who are out of work, but it pays this in most cases as a bonus added to the allowance made by labor organizations. It thus makes use of the methods of the second class to encourage institutions of the third.

The classification of labor laws just made is not only vital when we are considering the practicability of proposed measures; it also has an important bearing upon the work of this Association. The French and German names of the International Association indicate that it

was formed to deal only with such legislation as was placed by me in the first class, and the terms *Arbeiterschutzesetzgebung* and *La Protection Légale des Travailleurs* are synonymous. The adjective "protective", perhaps for the sake of euphony, perhaps for the sake of brevity, has been left out of the title as translated into English. But the limitation of scope still applies to the International Association, and the reason for it is simple. There already exists an international association for workingmen's insurance, which is the principal aim of legislation of the second class. There is likewise a coöperative congress which deals with what is probably the most wide-spread form of self-help among the laboring class, while the trade unions are many of them on an international basis and provide for an interchange of views in matters relating to their interests. The International Association, therefore, would be entering upon fields which are already preëmpted, if it were to deal with these other subjects. This does not necessarily limit the scope of the American Association, which can take up any subjects that it desires. But it does indicate its primary purpose.

We have thus far distinguished between different types of legislation with reference to the way in which it operates upon the economic processes. If we now look at the general purpose and trend of such legislation, we shall see that there are two main purposes which are not necessarily antagonistic, but which are yet distinct. The first purpose, which applies to all of the so-called labor protective laws and many of those which fall in the other two classes, is the preservation of the race and the maintenance of its quality. The principal argument for protecting children and women against excessive or unhealthy work is that the next generation is threatened.

The first child labor laws of Prussia were inspired by General von Horn, who, in 1828, called the king's attention to the difficulty of getting able-bodied recruits from the Rhine province. This same purpose applies to many other types of legislation. One of the strongest arguments for workingmen's insurance is that the burden which falls upon women and children in the case of industrial accidents or disease is lightened, and that thus the succeeding generation is brought up under more wholesome conditions. Quite a different purpose appears when legislation aims to influence the distribution of wealth between different classes, when it consciously tries to raise the level of the wage-receiving class at the expense of the employers or of the community at large. These two tendencies, which are really quite distinct, are often confused. Many people, especially those of the individualistic school, are apt to group all labor legislation together as socialistic; and in many cases the very epithet, in the mind of those who use it, is enough to condemn the movement. This, however, is a superficial view. Socialism is not the only antithesis to individualism. If the extreme individualist is one who believes in the greatest liberty of the individual, he may be restrained either in the interest of his contemporaries or in the interest of his successors. The motto of the individualist who disregards the interests of his contemporaries is: "The public be damned"; the motto of the individualist who disregards the interests of his successors is: "After us the deluge." Thus there are two policies opposed to individualism, one of which takes into account contemporary relations, the other of which considers the element of time. Our social world, like our physical, is a world of three dimensions, not of two. From one point of view individualism is justly contrasted with collectivism or socialism.

From the other it is contrasted with a movement which is in reality not new, but which is as yet so little conscious of itself that nobody has apparently thought of giving it a name. If we may be permitted to borrow a word which was, I believe, first coined by Mr. Louis R. Ehrich, we may call it "posteritism." This movement is so important for the welfare and the permanent strength of any society, and it is capable of so many applications, that it almost implies a revolution in our social ideals. The general care for the life, intelligence, and morals of the next generation, as shown in labor laws, in the steps taken for the preservation of the national health, in the fight against tuberculosis, and in the creation of playgrounds for children, is but part of a greater movement which also includes measures for preserving our forests and our mineral resources, for draining our swamps and for irrigating our deserts. Still another phase of it is seen in the study of eugenics by our sociologists. It is not difficult to interest people in the preservation of our natural resources, but those who are far-seeing recognize that the people who inhabit a country are as much an asset as is its material wealth. Indeed, one without the other would be of little use. The labor legislation for which this association primarily stands forms, therefore, a part, but a very important part, of the general movement for posteritism.

Much that we advocate is not new. England, the states of continental Europe, and many of our own states furnish us with an abundant experience on which to base future action. And yet the matter is attended, in the United States, with peculiar difficulties which are partly legal and institutional, partly economic.

The legal difficulties arise from the very framework of our government. We have within the limits of the

United States, excluding Alaska and our distant dependencies, no less than fifty-one different legislative bodies which have the power to pass laws for a larger or smaller territory. Our country presents a more complex legislative problem than all the states of Europe taken together. There is, it is true, no lack of labor legislation in the United States. During the year 1907 alone no less than 405 measures regarding labor were passed, and all of the legislatures were not working that year.¹ But though many of our states are far advanced and stand on a par with the best states of Europe with regard to certain matters, we find that even adequate laws for the protection of the labor of children are still lacking in many of the states, laws for the protection of the labor of women are often subject to attack and nullification on constitutional grounds. When we look at the administration of these laws, we are obliged to confess that in many cases they are not executed by experts, but that the poison of the spoils system still neutralizes in most of our states the good that laws might otherwise accomplish.

While in the world at large labor legislation has already passed beyond the national stage and has now become the subject of international treaties, we are still struggling with a lack of uniformity both in lawgiving and in law-enforcing within the limits of a single country. We are not even able to command satisfactory information with regard to industrial accidents or industrial diseases in order to guide future legislation. So simple a matter as the registration of vital statistics is still in such a state of chaos that Congress has been obliged to request the states to introduce registers and has ordered a model law drawn up for their guidance. If we look at the matter in all frankness we must acknowledge that, while our indus-

¹ Mass. Labor Bull., March-April, 1908, p. 69.

tries are noted throughout the world for the inventive-ness, the mechanical skill, the business talent which they command, and while we have every reason to be proud of our educational system and of our standing in international relations, we have apparently overlooked the art of legislation. The great mass of our state legislators have had no previous training in the study of lawmaking and law-enforcing. We prevent them from becoming skilled and responsible lawmakers by rotation in office, by infrequent sessions, and by constitutional limitations. The instruction which they receive from the lobby is often effective, but one-sided, since it is more apt to show them what is for their individual interest than what is for the interest of the public, present and future. There are fortunately signs of improvement. Expert commissions are being used more and more. The development of such an institution as the Legislative Reference Library in Wisconsin is doing much to educate our lawgivers. But the fact still remains that of all the industries of the United States lawmaking is perhaps the most backward.

There are also economic conditions which have made it peculiarly difficult to secure intelligent action on this subject in our country. The exhibit of the Pittsburgh Survey, which other speakers are to describe in detail at some of the other sessions of this gathering, may serve as an instructive object lesson. A visitor to that exhibit sees, as he enters the staircase hall of the Carnegie Institute, some beautiful frescoes representing the industries of Pittsburgh in their power and energy. As he ascends he sees another series of frescoes representing the "ceaseless movement of the people", men, women, and children passing on to work or play. It is true, as we are informed, that these figures are not idealized, but it is also true that the artist has shown but one side of the medal.

The assets are there, but where are the liabilities? Where is the depreciation account? If we pass into the room occupied by the Pittsburgh Survey, we see another frieze made up of small black figures, also passing in an endless procession around the room. Each one of these figures stands for one of the 622 deaths from typhoid fever which took place within a single year. Each one of them represents a loss of earning power to the families and a loss to the community, as well as suffering and weakness for those concerned. It is fair to say also that at least three-fourths of these were preventable, for some statistics placed upon the wall show that after the introduction of a filtration plant in the water supply of Pittsburgh the cases of typhoid fever were reduced by nearly three-fourths in the course of a year. Other figures show the deaths by accident, by tuberculosis, etc. Why is it that the community as a whole permitted this waste of human life to go on? It is not due to lack of engineering skill, for the highest ingenuity is displayed in the Pittsburgh mills. Nor is it due to lack of wealth, or business ability. It is mainly due to the fact that Pittsburgh, like the country as a whole, does not breed its own workers. A very large number of them are drawn from abroad. That supply keeps on coming in spite of typhoid fever and tuberculosis and the ten thousand annual deaths by accident on our railroads. A factory or a railroad must allow in its accounts for the deterioration of its machinery, or it will soon come to grief. But the United States is like a railroad company which can always obtain new locomotives by simply paying for the expense of running them. Such a company could well afford to disregard its scrap heap. But the human scrap heap is not so easily disposed of. The premature death of a worker means not simply the elimination from the industrial

world of another human machine, it often means a widow and children growing up in a state of poverty and want, it means a weak instead of a strong worker twenty years from now. Whatever the industrial structure of society may be at that time, whether capitalistic or socialistic or communistic, that means an economic loss. The action taken by us of the present generation to prevent that loss depends upon whether our social consciousness is able to project itself so far into the future as to be influenced by considerations which will perhaps never affect us personally. Socialism has emphasized the injustice of many of our social institutions. Posteritism points out our shortsightedness. If our motto is, "After us the deluge", we shall certainly take no thought for the morrow. But that was not the point of view of the founders of the Republic. For they framed the federal constitution, not only to "establish justice" but also to "secure the blessings of liberty for ourselves and our posterity."